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In The
Supreme Court of the United States

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Institution at Waymart; COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

GEORGE E. BANKS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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ARGUMENT

I. *TEAGUE* BARS CONSIDERATION OF BANKS' *MILLS V. MARYLAND* CLAIM.

A. Contrary to Banks' contentions, *Penry*, *McKoy*, and *Walton* do not demonstrate that the *Mills* rule of non-unanimity was dictated by prior precedent.

This Court has already addressed the application of the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), to mitigation process rules like that established in *Mills v. Maryland*, 486 U.S. 367 (1988). In *Saffle v. Parks*, 494 U.S. 484, 490 (1990), the Court distinguished for *Teague* purposes between rules "relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing determination, but to *how* it must consider the mitigating evidence." The Court recognized that arguments for the creation of both types of mitigation rules – categorical and procedural – might be made based on the "individualized sentencing" principle of *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. That principle, however, which arose from cases involving categorical restrictions on the factors available for mitigation, was sufficiently abstract that it could not be said to *dictate* – to "compel" – the creation of a different type of mitigation rule governing "how the State may guide the jury in considering and weighing those factors." *Id.* at 490-91.[1]

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[1] *See also Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) ("we have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"); *Barclay v. Florida*, 463 U.S. 939, 961 (1983) (*Lockett* cases do not establish "the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered") (Stevens, J., concurring in judgment).

Banks does not contest that *Mills* is a "how" rule concerning the consideration of mitigation evidence. Instead he argues that the distinction drawn in *Saffle* is without legal significance. He contends that "how" rules can have the same impact as "what" rules – *i.e.*, creating barriers to full consideration of mitigating evidence – and that therefore *Mills* was dictated by *Lockett* and is applicable on collateral review in his case. As authority for this implicit challenge to *Saffle*, he cites this Court's own opinion in *Penry v. Lynaugh*, 492 U.S. 302 (1989). Brief for Respondent at 21-22.

Preliminarily, Banks' position is puzzling because *Saffle*, not *Penry*, is the later case; if there were a conflict between the two, it is *Saffle* that would control. But there is no conflict. Indeed, the author of the Court's opinion in *Penry* joined the Court's opinion in *Saffle* the very next term. *Saffle* discusses *Penry* in explaining that rules regarding category-type restrictions on mitigation are dictated by *Lockett*, while other types of rules, governing the process for considering mitigation factors, are not. 494 U.S. at 490-91.

Banks' grand reliance on *Penry* to vindicate his *Teague* position ignores these facts and instead proceeds on a mischaracterization. He portrays the issue in *Penry* as involving, like *Mills*, a restriction on the manner in which the jury considered mitigating evidence, rather than a limit on the kinds of information to which the jury could give effect. Since Penry's claim was not *Teague*-barred, he says, neither is his. But the Court saw the question in *Penry* quite differently: as the latest installment in the case-by-case process of determining whether various types of mitigating evidence were properly cognizable under a particular capital sentencing scheme.

The immediate precursor to *Penry* in this effort was *Franklin v. Lynaugh*, 487 U.S. 164 (1988). There the defendant argued that the jury instructions did not allow jurors to consider character evidence concerning his good behavior while in prison. The concurrence, which provided

the necessary votes for the judgment, took the view that the Texas capital sentencing questions did allow the jury to give effect to such evidence. The concurrence noted that other types of character evidence might not fit within the special questions, and could therefore create a classic *Lockett* exclusion. *Id.* at 183-86 (O'Connor, J.).

Penry presented the situation presaged by the concurrence in *Franklin*. Penry sought mitigation based on evidence of mental retardation and abuse during childhood. The Court held that the Texas capital sentencing questions, although adequate for the type of evidence proffered in *Franklin*, were too narrow to give mitigating effect to the kind of evidence offered by Penry. Such a categorical exclusion was precisely within the command of *Lockett*, and therefore did not require the creation of a new rule under *Teague*. 492 U.S. at 314-28.

Mills, on the other hand, falls outside the traditional *Lockett* analysis employed in the *Penry* decision. As Banks would have it, *Lockett* was a sort of universal solvent washing away all walls that would regulate a jury's consideration of any evidence that might be called mitigating. *Mills* was just another wall, so it had to go, as a matter of indisputable mandate. But the Court's *Lockett* jurisprudence was not so indiscriminate. In the years preceding *Mills*, *Lockett* was applied by this Court to identify the kinds of mitigation that a jury must be permitted to use in reaching a reasoned moral response to the defendant and his crime. *See, e.g., California v. Brown*, 479 U.S. 538 (1987) (O'Connor, J., concurring). While other varieties of capital sentencing provisions might be characterized as barriers to mitigation, such a label could not dictate results from case to case.

Indeed even cases *after Mills* illuminate the uncertain contours of *Lockett*'s development in relation to sentencing procedures like jury unanimity. In *McKoy v. North Carolina*, 494 U.S. 433 (1990), decided twenty months after *Mills*, the unanimity question was still sufficiently clouded that four members of the Court were unable to discern the

rule within *Lockett*. *See* Brief for Petitioners at 19. A legal principle under such continuing disagreement is clearly a poor candidate for the kind of indisputable mandate required by *Teague*. Yet Banks, joined by his amicus, the Pennsylvania Association of Criminal Defense Lawyers, has found an even less compelling basis for the necessary mandate, located in Justice Kennedy's *McKoy* concurrence. Brief for Respondent at 23-24; PACDL brief at 6-9. That opinion took the position that a rule requiring non-unanimity at the mitigation stage could not be found within *Lockett*, but could be derived from the general prohibition on arbitrariness tracing back to *Furman v. Georgia*, 408 U.S. 238 (1972). 494 U.S. at 452-56 (Kennedy, J., concurring in judgment). But this is the very first announcement of a general "arbitrariness" principle, *distinct* from *Lockett*, applicable to mitigation procedures – and eight of the nine justices in *McKoy* declined to subscribe to it. Justice Kennedy's views in *McKoy* can hardly be described as "dictated" by prior precedent for *Teague* purposes.

Banks and his amicus make the usual error of claimants seeking "old rule" harbor: they treat precedent as mandate, while the function of *Teague* is to distinguish between the two. As Justice Kennedy himself wrote for the Court in *Saffle* (on the very same day as *McKoy*), "[e]ven were we to agree that our decisions in *Lockett* and *Eddings* [*v. Oklahoma*, 455 U.S 104 (1982)] inform, or even control or govern . . . , it does not follow that they compel." 494 U.S. at 491.

Yet another case from the same Term as *McKoy* demonstrates the unsettled application of *Lockett* principles to the regulation of the sentencing jury at the mitigation stage. In *Walton v. Arizona*, 497 U.S. 639 (1990), the Court held that there was nothing unconstitutional at all in requiring jurors to disregard mitigating factors unless they were convinced of them by a preponderance of the evidence. Banks and the PACDL argue that *Walton* is irrelevant to *Teague* analysis of the *Mills* non-unanimity

rule, because the preponderance standard at issue there obviously had no preclusive effect on jurors' consideration of relevant mitigation evidence. Brief for Respondent at 22-23; PACDL brief at 11-12. But that proposition has not been obvious to members of this Court. In *McKoy*, for example, the majority of the Court pointed out that

> evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence . . . . The meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding . . . . Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered.

494 U.S. at 440 (internal quotations and citations omitted).

It is not difficult to argue from such principles that a preponderance standard does indeed create a barrier to the consideration of relevant mitigating evidence in violation of *Lockett*, and four justices of the Court made exactly that argument in *Walton*.

> [U]nder Arizona law, [the sentencer] is entitled to give *no* weight to mitigating evidence on the ground that the evidence is *not mitigating enough*. Under the guise of a burden of proof, the statute provides that some mitigating evidence is not to be considered at all . . . . Decisions as to punishment, like decisions as to guilt or innocence, will often be based on the *cumulative*

> effect of several pieces of evidence, no one of which by itself is fully persuasive.

497 U.S. at 683-84 (Blackmun, J., dissenting) (emphasis in original). The dissenters went on to point out that, even if the sentencer were 49% convinced of each and every mitigating circumstance, the mitigation could not be given effect. *Id.* at 684. Indeed, in a jury sentencing system, all twelve jurors could agree unanimously that they were in equipoise on the existence of numerous mitigating factors, and yet be precluded from weighing any of them against aggravating circumstances. Viewed from this perspective, a preponderance standard would constitute *more* of a barrier to the consideration of mitigating evidence than the "single holdout" scenario that was so important to the decisions in *Mills* and *McKoy*.

Yet Mills won, and Walton lost. The point, of course, is not that one decision was correct and the other incorrect. The point is that litigants, and justices, made the same arguments, from the same precedents, over the same time period, to attack both unanimity and preponderance rules in the mitigation process – but with opposite outcomes. Surveying this legal landscape, the very least that can be said is that it was hardly smooth, and certainly not so straightforward as to reveal an indisputable mandate for the result in *Mills*.

Faced with the difficulty of surmounting this *Teague* barrier, Banks argues in effect that the standard should simply be lowered for him. He contends that "*Teague* does not treat all categories of rules in the same fashion," and that *Mills* is a rule for which he does not have to show an indisputable mandate. Brief for Respondent at 20. But in fact the *Teague* standard does not change depending on the content of the underlying rule; it just applies with different results. Whatever the nature of the rule subjected to *Teague* analysis, it must be compelled by, dictated by, existing law, or it cannot be employed on collateral review.

When Banks portrays *Mills* as nothing more than *Lockett* with a little twist of facts, he is playing down its place in the law. In reality *Mills*, while evolved from *Lockett*, exists as a distinct family of claims. On occasion rules of law, especially broad, abstract rules like the principle of "individualized sentencing," give birth to more specific requirements, creating new sub-classes of contentions that no longer depend directly on application of the original principle for their resolution. Thus in *Mills* cases, in contrast to mainstream *Lockett* decisions such as *Franklin* and *Penry*, no inquiry is necessary concerning the specific evidence offered and the manner in which it might have mitigating effect; the only question is whether, *per se*, the jury was required to reach unanimity before giving weight to such evidence.[2] That discrete basis for Eighth Amendment relief, however grounded in *Lockett* it may be, constitutes a new rule subject to the *Teague* bar on collateral review.

Expanding upon Banks' efforts to temper the *Teague* standard, however, the amicus brief of the American Civil Liberties Union[3] insists that developments in the law are not new, and thus may be invoked on collateral review, as long as they "fairly rest" on existing precedent. Any statements that appear to require more are, according to the ACLU, mere *dicta*. ACLU brief at 4, 9, 11, 27-29. As authority for its *Teague*-lite, "fairly rest" test, the ACLU cites two cases, *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994), and *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000), that say no such thing. This Court has made very clear that legal developments are new rules unless *dictated* by

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[2] Indeed the petitioner in *Penry* did not deem *Mills* to be of sufficient bearing on his case to cite it in his brief, even though at the time it was the Court's most recent Eighth Amendment ruling. Nor did this Court mention *Mills* in its decision in *Penry*.

[3] Joined by the National Association of Criminal Defense Lawyers.

existing precedent, and has refused to apply such developments, even where controlled by a prior decision, to cases on collateral review. *See, e.g., Butler v. McKellar*, 494 U.S. 407 (1990) (rule of *Arizona v. Roberson*, 486 U.S. 675 (1988), although directly controlled by earlier precedent of *Edwards v. Arizona*, 451 U.S. 477 (1981), was susceptible to debate among reasonable minds, and therefore was not applicable to cases on collateral review). Because the rule of *Mills v. Maryland* was not mandated by existing precedent, and because Banks argues neither of the two exceptions to the *Teague* bar, *Mills* could not be applied on collateral review.[4]

[4] The remaining assertions in the ACLU amicus brief amount to an extended straw-man argument. The ACLU maintains that, in the view of the Commonwealth and amicus Criminal Justice Legal Foundation, "*Teague* bars a claim from consideration in federal collateral proceedings unless a state court acted or might have acted unreasonably by rejecting the claim on the merits in the particular circumstances of a prisoner's case." ACLU brief at 2. Similarly, contends the ACLU, the position of the Commonwealth and CJLF is that "*Teague* has evolved into a blanket injunction that federal courts must defer to reasonable state court decisions." ACLU brief at 17.

Building on this foundation, the ACLU goes on at some length to explain that such an interpretation of *Teague* was rejected by a majority of the Court in *Wright v. West*, 505 U.S. 277 (1992), and would expand *Teague* into a rule of deference that would swallow up § 2254(d) of the AEDPA.

The ACLU neglects, however, to identify any page or language in the briefs of the Commonwealth or CJLF where this over-expansive view of *Teague* is articulated. In reality no such argument has been made. To the contrary, the Commonwealth argued just last Term in this case that the *Teague* inquiry is distinct from § 2254 and requires independent analysis. This Court agreed. *Horn v. Banks*, 536 U.S. 266 (2002), Pet. App. 61-68. Consistent with that differentiation, the *Teague* analysis in this case focuses not at all on the particular circumstances of the prisoner, but instead on the nature of the *Mills* rule within the context of existing law. The facts relevant to the state court's resolution of Banks' *Mills* claim, on the other hand, and the reasonableness of that

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B. Bank's conviction and sentence became final for *Teague* purposes at the conclusion of direct appeal in 1987, not at the conclusion of collateral review in 1995.

As an alternative argument, Banks contends that this is not a retroactivity case at all. Rather, he argues that his conviction became final not in 1987 but in 1995 – conveniently long after this Court's decision in *Mills* – when the Pennsylvania Supreme Court, on collateral review of the conviction, excused Banks' default of the *Mills* claim and rejected the claim on its merits. Brief for Respondent at 24-31. Banks' position is that, because of its practice of excusing some defaults in capital cases, the state court effectively employed an unspoken definition of "final judgment" that secretly transmutes collateral review into just another phase of direct appeal. If his collateral appeal is simply relabeled as a direct appeal, argues Banks, then *Teague* analysis becomes unnecessary.

Perhaps the most immediate problem with this argument is that it is utterly inconsistent with this Court's last opinion in this case. In *Horn v. Banks*, 536 U.S. 266 (2002), Pet. App. 61-68, the Court held that the Third Circuit *must* review the retroactivity question, even though the state court did not. In other words, the state court's decision to reject the claim on the merits (rather than on waiver or retroactivity grounds) does not change the obligation of federal courts sitting in habeas to address retroactivity when properly raised.

Banks asserts that last year's opinion should be disregarded, because "this Court did not have the opportunity to fully examine" his argument then. Brief for Respondent at 25 n.25. In reality, however, Banks

resolution, are the subject of the second question presented, concerning deference under § 2254.

presented essentially the same contention at that time: that *Teague* was not applicable to Pennsylvania collateral review, because the state court in capital cases often excused defaults under its "relaxed waiver" practice. Brief in Opposition to Petition for Writ of Certiorari, No. 01-1385, October Term 2001, at 1-2 & n.1. The fact that his argument takes up more pages now does not entitle Banks to reopen his previously rejected position.

Even apart from this Court's ruling in *Horn v. Banks*, there is another glaring problem with Banks' attempt to redefine the point of final judgment in his case: the Pennsylvania Supreme Court has already made a contrary determination. In *Commonwealth v. Banks*, 726 A.2d 374, 375 (Pa. 1999), on appeal from Banks' second collateral review petition, the state court observed that Banks' direct appeal did indeed conclude in 1987, and the judgment became final at that point.

Banks contends that this problem too can be disregarded. He notes that the state court's previous statements about final judgment in this case arose in the course of applying the filing deadline now contained in Pennsylvania's Post-Conviction Review Act. The filing deadline provision defines final judgment as the conclusion of direct review. 42 Pa. C.S.A. § 9545(b)(3). Banks suggests that this is not Pennsylvania's true definition of final judgment for *Teague* purposes, and that the state court's 1999 ruling in his case can therefore be overlooked. Brief for Respondent at 29. In reality, however, the definition of final judgment already applied by the highest state court in Banks' case is simply the standard meaning of the term, completely consistent with Pennsylvania law (from which it was directly drawn) and with this Court's understanding of the concept.[5] There is no basis for ignoring the

[5] *E.g., Commonwealth v. Riggins*, 542 A.2d 1004, 1010 (Pa. Super. 1988) ("conviction became final when it was affirmed on direct appeal";

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Pennsylvania Supreme Court's ruling that Banks' conviction and sentence became final in 1987 at the conclusion of direct review.

But even if that ruling had never been made, Banks' depiction of Pennsylvania law concerning final judgment would still be insupportable. Banks insists that Pennsylvania had a special, albeit clandestine, rule for final judgment in capital cases: that rule, in effect, was that there was no such thing as final judgment in capital cases. He deduces this unlikely result from the notion of "relaxed waiver" – the state supreme court's previous practice, as a matter of discretion, of excusing some defaults in capital appeals. Originally, the practice was designed as a safety net with which the court could catch egregious errors, at a time when channels of collateral review were less well-established than they later became. Over time, the court realized that the practice allowed litigants intentionally to hold back claims, thereby dragging out the growing length of the capital review process. After warnings proved fruitless, the court eventually abolished the practice. In doing so, the court expressed its concern that relaxed waiver had jeopardized the goal of finality.[6]

thus appellant not entitled to benefit of new law on collateral review); *Commonwealth v. Galloway*, 640 A.2d 454 (Pa. Super. 1994) ("appellant's conviction became final when our Supreme Court affirmed his judgment of sentence"; citing *Teague*); *see Fiore v. White*, 528 U.S. 23, 24 (1999) (after initial appeal, "[t]he Pennsylvania Supreme Court denied further review of Fiore's case, and his conviction became final"); *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) ("[a] state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied").

[6] *See generally Commonwealth v. Albrecht*, 720 A.2d 693, 700-701 (Pa. 1998); *Commonwealth v. Bracey*, 795 A.2d 935, 951-56 (Pa. 2001) (Castille, J., concurring) (describing development, purpose, and limits

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Banks seizes on the state court's use of the word "finality" in some of these decisions. Relaxed waiver prevented "finality," notes Banks; therefore as long as relaxed waiver existed, Pennsylvania capital judgments could not become final. Brief for Respondent at 26-27. Banks' syllogism, however, is specious. The Pennsylvania Supreme Court's references to finality as a jurisprudential objective cannot be interpreted as a *sub silentio* redefinition of the technical requirement of "final judgment."[7]

But there is no need to speculate on the point, or to knit Banks' fragments of "finality" quotations back into their proper context, because, in cases Banks does not mention, the Pennsylvania Supreme Court has been perfectly clear about its understanding of final judgment in *precisely* the context now before this Court. Thus, in *Commonwealth v. Peterkin*, 649 A.2d 121, 126 n.4 (Pa. 1994), the court held that the rule of *Mills v. Maryland* could not be applied to the appellant's claim, because his direct appeal became final before *Mills* and he was now on collateral review. In *Commonwealth v. Whitney*, 708 A.2d 471, 479 (Pa. 1998), the court made the same ruling. And in *Commonwealth v. Jermyn*, 709 A.2d 849, 869-70 (Pa. 1998), the court said it again.[8] All of theses cases were

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to "relaxed waiver"); *Commonwealth v. Freeman*, 827 A.2d 385, 398-401 & n.9) (Pa. 2003) (same).

[7] At one point in his brief, Banks quotes the words "finality of the judgment" in juxtaposition with a citation to *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), implying that *Albrecht* indeed addresses the final judgment question rather than "finality" as a general aspiration. Brief for Respondent at 26. In fact, however, the words "finality of the judgment" appear nowhere in the *Albrecht* opinion, either together or in any proximity to each other.

[8] *See also Commonwealth v. Szuchon*, 693 A.2d 959, 962 (Pa. 1997) (rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994), could not be applied because appellant's conviction and sentence became final before *Simmons*, at conclusion of direct appeal); *Commonwealth v.*

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capital; all were subject to relaxed waiver; yet all were deemed final at the conclusion of direct appeal. That is Pennsylvania law on final judgment in the capital collateral review context.

Banks' conviction and sentence became final in 1987. Ever since, he has been litigating on collateral review. *Teague* applies.

II. THE STATE COURT REASONABLY CONCLUDED THAT THE *MILLS* RULE IS NOT VIOLATED WHERE THE JURY WAS *NOT* INSTRUCTED TO BE UNANIMOUS IN ORDER TO FIND MITIGATING CIRCUMSTANCES, AND WAS INSTEAD INSTRUCTED TO BE UNANIMOUS IN ORDER TO *REJECT* MITIGATION.

In *Mills v. Maryland*, the verdict form explicitly instructed the jurors that they could mark "yes" for a mitigating circumstance only if they found it "unanimously," and that only such yesses could be considered in the weighing process. 486 U.S. at 387. In *McKoy v. North Carolina*, the verdict form explicitly instructed the jury that it must find mitigating circumstances "unanimously," and that it could weigh only those mitigating circumstances so found. 494 U.S. at 436-37. In this case the jury was never instructed that it had to be unanimous in order to consider mitigating circumstances, but was instead explicitly instructed that it must weigh "any" mitigation unless it was unanimous in finding *none*.

Henry, 706 A.2d 313, 322-23 (Pa. 1997) (same); *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 120 (Pa. 1998) (same).

Cf. Massaro v. United States, 538 U.S. 500 (2003) (excusing normal default rules in order to allow raising of ineffective assistance claims on collateral review rather than direct appeal).

Almost every court addressing this latter type of case, which lacks an express unanimity requirement for finding mitigation (essentially an "un-*Mills*" instruction) has upheld the constitutionality of the verdict. These courts have included, until its recent reverse, the Third Circuit itself. Banks labors to close the *Mills* gap between the kind of overt instruction this Court has condemned and the kind of neutral instruction that has been consistently approved; but he does not succeed.

Banks' initial effort to cross this divide is not an argument but the absence of one: he quietly ignores the decisions, from at least five federal circuits, sustaining unanimity-neutral mitigation instructions. *See* Brief for Petitioners at 33, 39-41. He makes no effort to distinguish any of these cases from his own. Most striking is his silence concerning the Third Circuit; he says nothing at all about the "sound-bite" theory invoked by the court of appeals to explain its change of view on Pennsylvania jury instructions. *See* Brief for Petitioners at 32-35.[9] But this is an AEDPA case, subject to the deference requirement of § 2254, and neither parties nor courts can disregard the terrain. The views of other jurisdictions on similar issues are highly relevant in determining whether a state court reasonably applied the law to a federal claim. If even Banks has no argument that these cases are either distinguishable or wrong, the Pennsylvania court could not have acted unreasonably in reaching comparable conclusions.

Rather than address the deference question in this context, Banks tries to hearken directly back to *Mills* by

[9] Indeed, Banks' only reference to the conflicting Third Circuit opinions, in a footnote on the forty-fifth page of his brief, serves to emphasize the factual similarities between them: "The *Frey [v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997)] verdict sheet was materially indistinguishable from the one reviewed in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991)." Brief for Respondent at 45 n.40.

comparing the Pennsylvania and Maryland capital sentencing statutes. He claims that in both states courts have had to devise "saving constructions" to eliminate *Mills* error from their law. Since juries could not have known of these after-the-fact constructions, they must have assumed that mitigating evidence could not be weighed unless found unanimously. Brief for Respondent at 33-34, 45. But in fact the Pennsylvania Supreme Court has made clear the view that its statute does not need saving. That is because Pennsylvania law states that the jury must be unanimous to find "no" mitigating circumstances. If it is not unanimous on this point, it must weigh "any" mitigating circumstances against aggravating factors. *Commonwealth v. Hackett*, 627 A.2d 719, 725 (Pa. 1993). The statute commands on its face that the jury be so instructed. 42 Pa. C.S.A. § 9711(c)(1)(iv).

Maryland law had no such provision. In its place, the *Mills* verdict form permitted the jury to consider only the mitigating circumstances that "we unanimously find." 486 U.S. at 387. An instruction explicitly requiring unanimity to find the *presence* of mitigation is materially different than an instruction explicitly requiring unanimity to find the *absence* of mitigation, and it was not unreasonable for the state courts to say so. Banks' effort to equate Pennsylvania and Maryland sentencing laws works only to highlight the essential divergence between this case and *Mills*.[10]

[10] While there was a split on the Court in *Mills* concerning the nature of the jury instructions given in that case, there was no dispute that the instructions explicitly required unanimity to find the presence of mitigation. The point of contention between the majority and dissent turned on whether the jury would *also* have understood the instructions to require unanimity to find the absence of mitigation. *Compare* 486 U.S. at 378-79 *with* 486 U.S. at 391-94 (Scalia, J., dissenting). In the present case, in contrast, there was *no* instruction requiring unanimity to find mitigation, and there *was* an instruction requiring unanimity to

(Continued on following page)

Lacking the express requirement of unanimity that is found in *Mills*, Banks attempts to create one by sheer imputation. He patches together various pieces of language from the charge and verdict slip, but always according to the same pattern: 1) the jury was told to find aggravating circumstances unanimously; 2) the jury was told to find mitigating circumstances; 3) therefore the jury was told (or so it would only "naturally" conclude) to find mitigating circumstances unanimously. Armed with this axiom, Banks is able to locate "error" all over the record, because of course the trial court and verdict sheet did use the words "mitigating" and "finding," now redefined to read "unanimous mitigating finding." Brief for Respondent at 34-40.

But Banks does not answer the real questions raised by his reasoning: Why would the jurors presume the *presence* of a mitigation unanimity requirement from the *absence* of a mitigation unanimity requirement? Why would they think the trial judge went to the trouble of using *different* language for aggravating and mitigating findings if he really meant them to be treated the *same*? The law works on exactly the opposite presumption: that the expression of one thing is the exclusion of another. This rule of construction "is based on logic and common sense, as it expresses the learning of common experience that when people say one thing they do not mean something else." *People v. Sherman*, 786 N.E.2d 139, 155 (Ill. 2003) (internal quotation and citation omitted). That is why the courts of appeals have generally rejected *Mills* claims where the instructions state a unanimity requirement for aggravation but are silent as to mitigation.

Banks perhaps hopes to avoid these difficulties by starting his argument from the proposition that even the

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reject mitigation. This is the exact converse of the circumstances in Maryland as perceived by the *Mills* majority.

jury in *Mills* was never expressly instructed to be unanimous in finding a mitigating circumstance. Brief for Respondent at 34. This premise permits him then to discuss all the ways in which his own jury also was not expressly instructed to be unanimous on mitigation,[11] and yet to conclude that he is nonetheless entitled to relief. The problem is that the premise is, as noted above, untrue.

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[11] *E.g.*, the verdict sheet, J.A. 66-68, which exactly followed the structure of the Pennsylvania sentencing statute. The form, like the statute, provided two alternative bases for a death verdict: either 1) that the jury unanimously find at least one aggravating circumstance and no mitigating circumstances, or 2) that the jury unanimously find at least one aggravating circumstance that outweighs any mitigating circumstances.

Similarly, Banks complains that the judge used the word "you" in addressing the jury during the sentencing charge. Banks contends that "you" is a "collective pronoun," meaning that the jury had to do everything together. Brief for Respondent at 37. In the English language, however, "you" is both a singular and plural pronoun, and it is unclear why the jurors would have understood the word to mandate unanimity. *See Commonwealth v. Jermyn*, 709 A.2d 849, 869 (Pa. 1998) (rejecting claim that trial court's use of "you" and "your" was equivalent to mitigation unanimity requirement under *Mills*).

In the same fashion, Banks highlights the judge's use of the phrase "scale of justice" in discussing the weighing process. Since there was only one (metaphorical) scale, says Banks, the jury would have to reach unanimity to employ it. Brief for Respondent at 37-38. Actually the judge mentioned both "scale" and "scales" during the charge, J.A. 26-27; but in any case it is difficult to imagine that the jury understood the reference as a requirement for unanimity in finding mitigating circumstances.

One aspect of the sentencing proceedings not discussed by Banks is the individual jury polling conducted at defense request after the verdict was reached. The judge began with juror no. 1, asked her if her verdict was based on the same criteria announced by the foreman or anything different, and then proceeded in similar fashion with each of the twelve jurors as to each of the twelve death verdicts for the twelve killings that were found to be first degree murder. J.A. 32-65.

The *Mills* jury *was* explicitly limited to unanimous mitigation findings. 486 U.S. at 387 ("we unanimously find . . . the following mitigating circumstances"). Banks' jury was not, and the state court's distinction on this ground was – at the very least – not unreasonable.

This brings Banks back to the central impediment for his and most other *Mills* claims in Pennsylvania: that the jury was instructed, as required by statute, to return a verdict of death only if 1) it unanimously found at least one aggravating circumstance and no mitigating circumstances, or 2) it unanimously found at least one aggravating circumstance that outweighed any mitigating circumstances. Banks points out that, by imagining the appearance of just a few extra words in the second option, its meaning is radically transformed. Thus, if the "unanimously" phrase were simply repeated – if the jury were instructed to vote for death if it unanimously found at least one aggravating circumstance that outweighed any mitigating circumstances *that it unanimously found* – a *Mills* problem would arise. *See* Brief for Respondent at 47-48. Certainly: the addition of another reference to unanimity, placed grammatically so as to modify "mitigating circumstances" directly, would put the ball in the hole for any *Mills* claimant. But neither the rule of law nor the rules of grammar permit such a rewrite of the instruction.

Banks' real complaint in this regard appears to be that a single sentence should not be sufficient to determine the outcome of his *Mills* claim. *See* Brief for Respondent at 43-48. There is only one concept at issue here, however, and it is an idea that can be stated in a single sentence. Various forms of that sentence may appear throughout the charge or verdict sheet, but if the concept is stated correctly, the instructions are proper, and if not they are not. Thus in *Mills* and *McKoy* a single sentence was sufficient to taint the instructions. And even in Banks' view, a single sentence would apparently be sufficient to save the instructions, if that sentence stated explicitly and without contradiction that jurors need not be unanimous

in finding mitigating circumstances.[12] Detailed, separate analysis of the charge and slip might be dispositive if they are inconsistent internally or with each other. But not even Banks argues that such is the case here; his position is that the same "error" occurred throughout the sentencing proceeding: the "error" of talking about unanimity for finding aggravating factors without explicitly talking about non-unanimity for finding mitigating circumstances.

Thus Banks' position is in effect that the Eighth Amendment requires not an "un-*Mills*" instruction but an "anti-*Mills*" instruction in every death penalty case. But this, again, is a § 2254 deference case. The circuit courts have held repeatedly that silence about unanimity for finding mitigating circumstances does not violate the Eighth Amendment, even when that silence occurs in proximity to affirmative requirements of unanimity for finding aggravating circumstances. This case is even stronger than those, because the jury instructions not only avoided any express requirement for finding mitigating circumstances; they also included an explicit command for unanimity in order to *reject* mitigation. The state court did not act unreasonably in ruling that such instructions were proper under the Constitution.

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[12] Banks cites with approval Pennsylvania's new, post-*Mills* capital verdict form, which directs the jury to indicate the "aggravating circumstance(s) unanimously found" and the "mitigating circumstance(s) found by one or more of us." Pa. R. Crim. P. 807. He argues, however, that the form is an acknowledgement that something was wrong with previous practice. Brief for Respondent at 41.

The Pennsylvania Supreme Court has squarely rejected that characterization. Previously, there had been no uniform verdict sheet in capital cases. The purpose of the new form was to ensure a consistent state-wide procedure. *Commonwealth v. Tilley*, 595 A.2d 575, 586 (Pa. 1991). Given the extensive resources devoted to *Mills* litigation over the last two decades, the court understandably chose language that, it hoped, would put such claims to rest in the future.

CONCLUSION

For the reasons set forth above and those in the Brief for Petitioners, petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit, and deny the petition for writ of habeas corpus.

Respectfully submitted,

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